In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 317

WILLIAM ESTEP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B; R. 885) is reported at 223 F. 2d 19.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C; R. 885) was entered on June 8, 1955. A rehearing was denied on July 15, 1955 (Pet. App. A). The petition for a writ of certiorari was filed August 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence against petitioner of the books and records of a company he had formed, which were given to the government by a former officer of the company who came into possession of them in his official capacity, violated the Fourth and Fifth Amendments.

2. Whether the evidence showing use of the mails was sufficient to warrant the denial of the motion for acquittal.

3. Whether the court erred in its charge to the jury.

STATUTES AND RULES INVOLVED

Section 5 of the Securities Act of May 27, 1933, 48 Stat. 74, 77, 15 U. S. C. 77e (1925 ed.) provides in pertinent part:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> * * * * *

Section 17 of the Securities Act of May 27, 1933,

48 Stat. 84, 15 U. S. C. 77q (1952 ed.) provides in pertinent part:

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * *

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be

such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be set or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted upon nine counts of a ten count indictment (R. 1-14). Counts 1-4 charged use of the mails in furtherance of a scheme to defraud; counts 6-8 dealt with violations of the fraud provisions of Section 17 of the Securities Act of 1933 (*supra,* pp. 2-3); counts 9 and 10 concerned violations of the registration provisions of Section 5 of the Securities Act of 1933 (*supra,* p. 2). The court sentenced petitioner generally to five years imprisonment and a fine of $2,000 on the fraud counts, and imposed a general sentence of five years imprisonment on the non-registration counts, to run concurrently with the sentences on the other counts (R. 13). On appeal, the judgment was affirmed (Pet. App. C; R. 885-892).

The scheme to defraud alleged in the indictment and proved at the trial related to the sale of subscriptions of the capital stock of Atomotor Manufacturing Company, Inc., which was represented as being about to market a fuelless self-energizing motor. A number of representations alleged to have been made to induce persons to purchase stock subscriptions (R. 2-5) were established by the testimony of witnesses who had purchased the stock (R. 54-64, 164, 174, 177-182, 215, 218, 226-228, 273, 274, 320-323, 341-346, 372-377, 386-390, 403-409).

The falsity of these representations was proved in various ways. The government showed that qualified engineers had told petitioner that the motor could not possibly work (R. 487, 646), and that a patent attorney had told petitioner that no patent could be obtained thereon (R. 529-535). The government also showed that petitioner had oversold the authorized capital stock of the corporation (R. 808-809, 814-817, 819), and that he used some of the money obtained from the sale of stock, all of which he had said would go to finance the motor, for his own personal use (R. 409-474).

As part of its case, the government proved that petitioner used the mails in furtherance of his scheme to defraud (R. 105, 810-811; R. 110, 812, 813; R. 111, 813; R. 143, 818, 819; R. 148, 820-822; R. 269, 829; R. 302, 831; R. 304, 831, 832; R. 307, 833; R. 319, 834; R. 335, 836; R. 338, 837; R. 350, 839; R. 357, 840, 841; R. 358, 841, 842; R. 492, 862; R. 494, 867; R. 505, 870 and R. 607, 874). The

government also proved that non-registered securities were sent through the mails (R. 307, 833) and their sale solicited through the mails (R. 338, 837).

Petitioner objected to the introduction into evidence of the books and records of the company (R. 132-140). These consisted of the minutes of the meetings and the list of stockholders (R. 140). They were given to the government voluntarily by the company's former secretary who came into possession of them in the course of his duties (R. 141). The secretary could not recall if he received a letter from petitioner requesting the return of the books and records before or after he turned them over to the government (R. 141-142). He had resigned as secretary before turning them over to the government (R. 138).

The trial court overruled motions made by petitioner at the close of the government's case, and again when both sides rested, for a judgment of acquittal on the ground that the evidence was insufficient to warrant a conviction (R. 668, 781).

In charging the jury, the court outlined all elements of the offenses involved in violation of the mail fraud and securities statutes (R. 784-795). Petitioner's counsel stated that the court's main charge was highly satisfactory, but objected to special charges three and four requested by the government (R. 800-804).

Charge three read as follows (R. 17-18):

> It is not essential that the Government show by the required degree of proof that all alleged false and fraudulent representations, pre-

tenses and promises made by the defendant were false or that all of the alleged false representations, pretenses and promises specifically charged in the indictment were in fact made by the defendant. It is enough if the Government establish by the required degree of proof that the defendant devised a scheme or artifice to defraud and made one false representation or promise or omitted to state one material fact which you may find necessary to have been disclosed in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and all in furtherance of the scheme to defraud.

You are further charged that it is not essential that the Government show by the required degree of proof that all the investors in the capital stock of Atomotor Manufacturing Company, Inc. were defrauded, if any you so find, but it is sufficient if you so find that any one or more of such investors were defrauded.

Petitioner objected to this charge on the ground that it was immaterial whether anyone was defrauded—stating that the charge would therefore be misleading (R. 800-801).

Charge four read as follows (R. 18-19):

False representations, if any, can not be justified by a belief that profits will eventually be realized by persons induced to purchase stock. No amount of honest belief that a corporate enterprise will ultimately make money

for stockholders will excuse false representations or concealment of material facts to obtain money for such enterprise.

Petitioner objected that this was "calculated to mislead the Jury into the belief that if Estep did not believe they would make big money alone, why, that would be no defense" (R. 802).

ARGUMENT

1. The introduction into evidence of the books and records of the Atomotor Manufacturing Company, Inc., did not violate the constitutional directions against unreasonable search and seizure and compulsory self-incrimination. For the books did not belong to petitioner, they were not in his possession, and they were not kept by him. Nor was a search and seizure involved.

(a). The record clearly shows that the books and records were given to the government voluntarily by a former company official who had come into possession of them in his official capacity. Whether or not he should have turned them over to the company upon his resignation is immaterial in this case. Property stolen by a private person and turned over to the government was held admissible in *Burdeau* v. *McDowell*, 256 U. S. 465, 475. *A fortiori*, admission into evidence of property given to the government by one in possession of it does not violate the Fourth Amendment. In an effort to link the government with the company officer's retention of the records, petitioner refers to him as an "agent" of the government (Pet. 19) and of the

prosecution (Pet. 20). But agency is not established by the mere fact that the secretary turned the evidence over to the government and became a witness for the prosecution. His acts in retaining the property were not caused by the government and no government agent participated therein.

(b). Since the records were corporate books, no issue of self-incrimination is presented. *Wilson* v. *United States,* 221 U. S. 361, 385.

2. There was ample evidence before the jury to warrant denial of the motion for acquittal.

Petitioner argues that, since much of the stock was sold directly at meetings, the use of the mails was merely incidental to the operation of the corporation (Pet. 21). However, it is well established that the use of the mails in a scheme to defraud need not be an essential element of the scheme. *Pereira* v. *United States,* 347 U. S. 1, 8. It is sufficient under the mail fraud statute that the mails were in fact used in furtherance of the scheme. *United States* v. *Young,* 232 U. S. 155.

Moreover, there was much evidence to show that use of the mails was an important part of the scheme to defraud. The government introduced various letters written by petitioner and sent through the mails which contained claims that the Atomotor was working well and was a great success (R. 107, 338, 359, 818, 831); that a patent had been arranged (R. 813); that a large bank was backing him (R. 813); that a fine offer from a Dallas firm had been received to make and market the engines (R. 820). Other letters expressed hope that more

stock could be sold (R. 107), sought help in selling shares (R. 354, 875), and announced stockholder's meetings (R. 812, 269, 319).[1]

Since conviction on any one of the counts will support the general sentence imposed (*Hirabayashi* v. *United States,* 320 U. S. 81, 85), we need not discuss in detail the evidence as to each count. It is enough to point out that evidence of stock certificates mailed (R. 307) and a solicitation by letter of help in selling shares in the Atomotor Company (R. 875) supports counts 9 and 10 for using the mails to sell or deliver non-registered securities. There was no claim that the securities were registered.

3. The error which petitioner now finds in the giving of charges 3 and 4 is that they amounted to a withdrawal of the correct charge already given and led the jury to believe that, regardless of petitioner's intent, if they found that any of the stockholders had lost money in this venture it was their duty to convict (Pet. 17). A mere reading of these charges establishes that they are not subject to such an interpretation. The second paragraph of charge 3, indicating that the jury must find that at least one investor was defrauded, may have been prejudicial to the government, since there was no need to prove that anyone was actually defrauded, but under no circumstance could the instruction have been viewed by the jury as requiring conviction merely if someone lost money. To "defraud"

[1]Among the letters on which particular counts were based were letters of these types (R. 818, 338, 831, 354).

does not and cannot mean to cause someone to lose money. Moreover, the court in its main charge had fully discussed the necessity for a finding of intent (R. 790-791).

Cases cited by petitioner in support of his contention (Pet. 18-19) state broad and general propositions of the law as to jury charges, based upon different factual circumstances and, with the exception of *Freeman* v. *United States,* 96 F. 2d 13 (C. A. 5), upon different statutes. In the *Freeman* case, involving the mail fraud statute, the court stated that the instructions must be read as a whole and refused to read an inconsistency into the charge. 96 F. 2d at 14. That is the situation here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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